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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK J. BATTAGLIA, *et. al.*,

Petitioners,

v.

ROBERT M. BERGER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, consistent with the First and Fourteenth Amendments, a public employer may prohibit certain off-duty conduct of a public employee, which is not pure speech, but is rather a form of personal artistic expression that neither criticizes the employer nor causes political or social debate, but threatens the delicate external relationships and functions of the employer.

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

FRANK J. BATTAGLIA, Individually and as Police Commissioner, City of Baltimore,

and

Baltimore Police Department

Appellees Below
Petitioners Here

v.

ROBERT M. BERGER

and

RAY FRANKLIN BARHIGHT, JR.

Appellants Below
Respondents Here.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Frank J. Battaglia and the Baltimore Police Department, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on December 20, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 779 F.2d 992 (4th Cir. 1985), reprinted herein as Appendix A. The opinion of the

United States District Court for the District of Maryland is unreported (No. B-82-880, USDC,DMd., March 21, 1984), reprinted herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 20, 1985. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment:

> § 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or prosperity, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, §1983.

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be construed to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action was commenced pursuant to 42 U.S.C., § 1983.

Robert M. Berger was a white police officer employed by the Baltimore Police Department since 1972. For years it was his hobby to perform music during his off-duty hours. Over this period, Berger developed his hobby into a successful stage show wherein he sang and played various instruments. One portion of the show was Berger's impersonation of the late singer Al Jolson, which he performed in "blackface" makeup and black wig in much the same manner as Jolson.

Berger would imitate Jolson in costume, manner, and material. As Jolson had done, he would put on "blackface" makeup to darken his entire face, except his eyes and lips. The eyes and lips were highlighted with white makeup to give the appearance of abnormally large lips and white eyes. Like Jolson, Berger would wear a curly wig, white gloves, and a tuxedo.

His material, also that of Jolson's, was comprised of songs such as "Mammy" and "Waitin' on the Robert E. Lee" that were rooted in, or influenced by, pre-civil war southern black culture.

Berger performed publicly for several years without Departmental interference. Only minor difficulties developed as a result of these performances. In December 1981, Berger was disciplined for violating a Departmental regulation that required a member to obtain approval before engaging in secondary employment.

For years Berger gained notoriety as the "singing cop." He was the focus of television shows concerning the off-duty conduct of police officers. In February 1982, Berger's public performances again came to the attention of the Department. Berger was approached by the Hilton Hotel in Baltimore to perform his act, including the Jolson routine. The agreement reached between Berger and the Hilton called for a two-week tryout, with a longer engagement possible, if the act were popular.

To publicize the show, the Hilton Hotel advertised in Baltimore's major newspapers. The advertisement included a depiction of an Al Jolson figure in full costume. The show was billed as the "Al Jolson Revue," and Berger's name appeared in the ad, although he was not identified as a Baltimore police officer.

The sight of these advertisements offended many black citizens of Baltimore, especially members of the National Association for the Advancement of Colored People (NAACP), some of whose members and leaders resolved to express their disapproval of a white

entertainer appearing in blackface, and, if possible, prevent the performance from commencing.

On February 7, 1982, Berger's show was to open for three nights at the Hilton. When he arrived for the show, he was met by two men, Dr. Wallace Gatewood and Adam Van Landingham, who introduced themselves as representatives of the NAACP, and demanded that he not perform his Jolson routine because it was insulting to blacks. Following a discussion, Berger agreed to do the entire show, including the Jolson portion, without makeup or props in order to demonstrate the lack of racial content. Following the performance, Berger received a standing ovation from the entire audience of some 150 people, including Gatewood and Van Landingham. Both men expressed their approval of the act, as performed that evening, to Berger.

On February 8, 1982, Berger was again prepared to perform for a full house. Before the show he encountered Gatewood and Van Landingham, who, in contrast to the preceding evening, were "cool" towards him. Van Landingham warned Berger not to do the show in blackface. Berger, however, performed the Jolson numbers in blackface, and again received a standing ovation.

The following night, February 9, the Hilton Lounge was filled by 8:15 p.m. However, the atmosphere had become increasingly tense as the time of the show approached. Dr. Emmett Burns, Regional Director of the NAACP and approximately thirty demonstrators associated with the NAACP set up a picket line outside the Hilton to protest the continuation of the engagement. Bobby Cheeks, a local activist, led another group of about eight protesters.

As the time for Berger's performance drew near, some of the protesters entered the hotel and the lounge itself with the intention of preventing the performance. One group of protesters was prepared to go onto the stage and stop the show by physical force, if necessary.

The demonstrators' presence in the lounge precipitated conversations between them, the Hilton management and owner, and Sergeant William D. Lawson of the Department's Community Relations Section. In addition to the demonstrators' complaints, the management learned that a "white rights" organization was in the hotel and planned to insure that the Jolson show would go on as scheduled. Despite warnings of arrests and violent confrontations, a more militant group of protesters prepared to attack the stage if the Jolson act proceeded.

In response to the threat of confrontation, Sergeant Lawson requested additional police assistance. Some two dozen officers from the Tactical Squad and the Central District, plus wagons, were dispatched to the Hilton under orders to remain on standby, out of sight, and away from the main entrance to the Hotel, unless they were needed for crowd control.

This redeployment of forces left eight posts in the City's Central District unmanned (but covered by personnel from adjacent manned posts, which "doubled-up" their coverage) for approximately two hours.

As the Fourth Circuit found, "Lawson's and the Department's primary concern on February 9, was that if the demonstrators were unsuccessful in stopping the performance on that evening, their numbers

would increase geometrically on the evenings of subsequent scheduled performances." 779 F.2d at 995.

Before the Jolson set commenced, the Hilton management, concerned with the extent of the problem, cancelled the show and closed the lounge.

Following the events of February 9, the police department received a number of bitter complaints from black citizens objecting vehemently to a police officer being permitted, as they saw it, to publicly insult their race.

The complaints were not related to the content of Berger's act, but only to the appearance in blackface by a police officer, which they characterized as "abhorant, repulsive stereotyping."

These complaints were matters of serious concern to the Department which had engaged since the mid-60's in improving its previously strained relations with the black citizens of Baltimore. The Department feared that its community relations efforts would be seriously undermined by widespread outrage over Berger's performance. Police Commissioner Frank J. Battaglia referred the matter to Deputy Commissioner William Rochford for appropriate action.

As a result, on February 19, 1982, Berger was ordered by his commanding officer, Captain Walter T. Jasper, to cease appearing in public performances wearing blackface makeup on pain of being found in violation of the Department's rule prohibiting activity on the part of a member, "that tends to reflect discredit upon himself or upon the Department."[1]

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[1] The text of the orders is as follow: "Rule 1, Conduct, prohibits activity on the part of a member of the Department that

Berger brought an action, under 42 U.S.C., §1983, against the Department and Battaglia, claiming deprivation under color of state law of rights secured by the First and Fourteenth Amendments. Specifically, he alleged violation of free speech rights by the prohibition orders. A co-plaintiff, Barhight, joined the action, alleging that the same departmental acts deprived him of his rights under the First and Fourteenth Amendments to see and hear the prohibited performances.

The United States District Court for the District of Maryland entered judgment for the Commissioner and the Police Department. The Court, per Judge Walter E. Black, Jr., held that the prohibition order was sufficiently narrow in scope and that the public had only a limited interest in having the wearing of makeup protected. Accordingly, the Department's interests outweighed those of Berger's. The prohibition order was upheld.

Berger filed a timely appeal to the Fourth Circuit Court of Appeals. The case was argued January 9, 1985, and decided December 20, 1985. The Fourth Circuit reversed and remanded.

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tends to reflect discredit upon himself or upon the Department. It has come to the attention of the Department that you have engaged in off-duty activity which involves your performing in public wearing 'blackface.' This activity has become the subject of tremendous negative reaction from members of the public who perceive this to be demeaning to the black race. Specific criticism of the Department has resulted from the activity. Accordingly, you are hereby specifically directed and ordered to cease and desist from appearing in public performances wearing 'blackface.' Failure to abide by the above will result in the institution of disciplinary action against you." /s/ Walter T. Jasper.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER A PUBLIC EMPLOYER MAY, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS, REGULATE THE OFF-DUTY CONDUCT OF A PUBLIC EMPLOYEE, WHICH IS NOT PURE SPEECH, BUT RATHER A PERSONAL ARTISTIC EXPRESSION THAT NEITHER CRITICIZES THE EMPLOYER NOR CAUSES POLITICAL OR SOCIAL DEBATE, BUT THREATENS THE DELICATE EXTERNAL RELATIONSHIPS AND FUNCTIONS OF THE EMPLOYER, IS A CASE OF FIRST IMPRESSION AND POSES IMPORTANT AND UNSETTLED QUESTIONS OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The resolution of First Amendment problems in the area of public employment depends upon a balancing of competing interests. As a result of this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), a court must strike "a balance between the interest of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employee." Id. at 568. Thus, when the speech of an employee does not touch upon matters of public concern, the balance swings in favor of the employer. In such a case, the First Amendment would not protect the public employee from discipline and control by the employer.

However, before any balancing of competing interests may be attempted, there must be a determination that the acts of the public employee are in fact "speech" within the meaning of the First Amendment, and if "speech" is found in such acts, whether

it is entitled to the full panoply of First Amendment protection.

The initial question posed in the case at bar thus becomes whether the wearing of blackface theatrical makeup is of itself protected "speech." It is important to remember throughout our review of this case that it was only the wearing of blackface makeup that was prohibited by the employer, and that absolutely no objection was made concerning any other aspect of Berger's performance.

A. "Freedom of Expression," Which the First Amendment Guarantees, Does Not Include All Modes of Communication of Ideas by Conduct.

It is doubtful whether Berger's public appearance wearing makeup amounted to "pure" speech. At best, wearing makeup of a certain style could be characterized as "symbolic" expression.

The pivotal case decided by this Court, which specifically deals with government regulation of "symbolic" speech, is *United States v, O'Brien*, 391 U.S. 367 (1968). O'Brien argued that a federal statute prohibiting the destruction of a draft card was unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. He further contended that the freedom of expression which the First Amendment guarantees includes all modes of communication of ideas by conduct. This Honorable Court disagreed.

The Court rejected the argument that there was an "apparently limitless variety of conduct [which] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Id. at 376. The Court went on to say that "when 'speech' and 'nonspeech' " elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on the First Amendment freedoms." *Id.*

Petitioners would submit that the wearing of blackface makeup has not been demonstrated to be "speech" at all. In fact, all of the evidence was to the effect that such makeup was not even a vital part of Berger's theatrical performance. As the record discloses, Berger received a standing ovation from the patrons of the Hilton Hotel when he performed on the evening of February 7, 1982, sans makeup. Even if we assume that there is some sort of "symbolic speech" involved in the wearing of such makeup, the governmental interest involved should control.

On the basis of *O'Brien*, the Department's interest was "sufficiently important" to justify the incidental, not total, limitation on Berger's public performances. The *O'Brien* test only requires that the governmental interest be "sufficiently important." The government is not held to a stricter standard to justify their action.

The constitutional principles of *O'Brien* are perfectly apposite here. It is well accepted that police departments may adopt rules and regulations necessary to the administration of the day-to-day duties and discipline of the agency.[2] In the instant case, the Department has demonstrated, through witness tes-

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[2] *See, e.g., Kelly v. Johnson*, 425 U.S. 260, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976), (county regulation limiting the length of county policeman's hair was constitutional.)

timony, substantial interests[3] that were to be protected by the order prohibiting Berger's blackface performances and the prohibition order was a narrow means for protecting those interests.[4] Finally, the Department's prohibition order condemned only the appearance in blackface, the noncommunicative element which was combined with a speech element, not the actual musical compositions. As the District Court held, the noncommunicative impact of wearing blackface makeup substantially frustrated the Department's legitimate interest. Therefore, a "sufficiently important" governmental interest was shown which would justify the regulation of Berger's conduct.

Since the First Amendment is fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people, *see e.g., Roth v. United States*, 354 U.S. 476, 484, (1957), it is questionable whether wearing blackface makeup is designed to express any ideas which require political or social changes, or the public need to debate. There was no claim by Berger that his appearance in makeup was designed to bring about anything other than a personal desire on his part to emulate Al Jolson in the most complete sense.

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[3] The District Court found these interests to be "compelling." Judge Black gave considerable weight to the effect the performance had on the black community and the effect that Berger's performances might have on that relationship and the Department's resources. (See Appendix B at 40a).

[4] Judge Black found that, "Given the narrow scope of the order and the public's limited interest in having the speech protected, the [*Pickering*] balance tips in favor of the Department." (See Appendix B at 40a). The Fourth Circuit did not address the appropriateness of the prohibition order.

The logical inference to be drawn is that, like any other prop or costume, theatrical makeup merely expresses a personal preference in the manner in which the wearer desires to present his conduct.

Accordingly, this conduct should not be accorded the protection of "pure" speech. At best, Berger's conduct could be considered "symbolic" expression which need not be accorded the full weight of First Amendment protection in light of contrary governmental interests.

B. The Wearing of Theatrical Makeup is Not a "Matter of Public Concern" Contemplated by *Connick v. Myers*

This Court, in *Connick v. Myers*, 461 U.S. 138 (1983), expanded the principles announced in *Pickering, supra*, to include the proper analysis for determining when speech was a "matter of public concern," and, therefore, protected from employer chilling.

In the instant case, Berger wore a certain style of makeup during public performances. The wearing of makeup was not the type of speech contemplated by *Connick, supra, Givhan v. Western Line Consolidation School District*, 439 U.S. 410 (1979); *Mt. Health City School District v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sinderman*, 408 U.S. 593 (1972); and *Pickering v. Board of Education, supra.*

All of the above cited cases involved comments made by public employees upon public issues and matters of public concern. In the instant case there were no comments at all. Rather, Berger was concerned merely with a personal expression not at all related

to public issues, concerns or controversies and not at all related to any educational purposes.[5]

If a public employee's statements cannot be fairly characterized as constituting speech on a matter of public concern, then it is unnecessary for the courts to scrutinize the reasons for the employer's discipline. The Court has stated in *Connick*: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S. at 147.

In *Connick, supra*, at 148, this Court set forth the criteria to be used by courts when deciding the nature of employee comments: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the entire record."

The Fourth Circuit properly undertook to analyze Berger's expression in light of *Connick's* test for what constitutes "matters of public concern." The Court, however, failed to distinguish between the "speech" and "nonspeech" elements of Berger's performance. *See, e.g., U.S. v. O'Brien*, supra.

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[5] In *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) cert. denied, 434 U.S. 1087 (1978), the Court drew a distinction between public interest in education and public interest in law enforcement. "[S]ubstantial differences between the public interest in education and the public interest in safety and order justify a difference in the standards by which the respective institutions may protect themselves from attempted destruction by their employees."

Applying the Connick rationale, the Fourth Circuit found that Berger's performances "were not purely personal expressions of no concern to the community." 779 F.2d 992, 999. The Court ruled that the "performances" constituted speech upon matter of public concern "to those considerable segments of the community who willingly attended and sometimes paid to see and hear them." *Id.*

The Fourth Circuit concluded its analysis of Berger's speech by stating: "That the content was sheer entertainment—presumably neutral as to any political or even social views—does not of course take them outside first amendment protection." *Id.*

This Court has held that if speech does not rise to a "matter of public concern," the *Pickering* balancing test need not be invoked. *Connick, supra,* at 147. Upon those matters where "free and open debate is vital to informed decision-making by the electorate,"[6] it can be fairly stated that the speech was on a matter of public concern.

The Fourth Circuit has found that Berger's speech was devoid of political or social value. 779 F.2d at 999. The wearing of blackface makeup was not intended to provoke free and unhindered debate on matters of public importance—considered to be the core values of the free speech clause of the First Amendment. *See e.g. Pickering v. Board of Education, supra,* at 573. Rather, under the principles of *O'Brien, supra,* wearing theatrical makeup could be considered "symbolic" speech, which is only tangentially connected with the protected speech.

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[6] *Pickering v. Board of Education, supra,* at 571, 572.

Had the Fourth Circuit adopted this analysis, they might have found that, consistent with *Connick* and *O'Brien*, Berger's "performance," so far as the music element was concerned, was upon a "matter of public concern." The contested nonspeech element was a personal expression, in makeup, of the mannerisms and costume of a performer, and thus not upon a matter of concern at all.

This Court has perceptively noted in *Connick, supra*, the dilemma faced by public employers who are confronted with situations similar to the case at bar:

> Our holding today is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. 461 U.S. at 155.

The operation of a metropolitan police department the size of Baltimore's is a difficult task to say the least. When a police department loses the ability to protect its own vital interests that are adversely affected by its employees, its ability to deal with the public in general is greatly jeopardized. For this reason, when the Baltimore Police Department undertook to protect vital and delicate relationships by prohibiting the conduct of its own employee who jeopardized the tranquility of a city, the prohibition order was narrowly drawn to chill only that portion of Berger's conduct which could fairly be characterized as "symbolic" expression not upon a matter of public concern.

Berger's conduct, then, is not the type of conduct contemplated by *Connick, Obrien*, or *Pickering*.

C. Disruption by Employee Speech of a Public Employer's External Operations and Important External Relationships Justifies Limitations Being Placed Against the Employee's Action.

The issue which was prominent in Pickering and its progeny—the disruption of internal discipline and functions—is absent in the present case. What this Court is faced with is the issue of disruption of an employer's external relationships and functions as a basis for limitations based on employee conduct.

A police department performs a unique governmental function and the police officer is a public employee with unique characteristics. *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970). The purpose of the police agency is not to foster intellectual development and public discourse, as would a school or university, from which many First Amendment cases flow, but to stand as the "thin blue line" between order and chaos, between organization and anarchy. The missions of the two professions contrast greatly: the teacher is to promote intellectual change and growth, and the police officer is to ensure physical stability and security. The two roles, while different, are symbiotic in nature. The police officer guarantees an environment in which the teacher may function while the teacher helps brings about the gradual growth of the society the officer defends.

Without doubt, the police department's function involves interests far different from those of other governmental agencies. In general, the government has additional interests as an employer, and when the governmental agency is a police department in a large

city such as Baltimore, those interests increase significantly. *See, e.g., Childers v. Dallas Police Department*, 513 F.Supp. 134, 140 & 141 (ND Tex. 1981).

This is not to say that a state can condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. *Connick v. Myers* 461 U.S. 138, 142, (1983); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education*, 391 U.S. 563, (1968); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507 (1980). But as this Court recognized in Connick, "the *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150-150. The Court further cited *Ex Parte Curtis*, 106 U.S. 371, 373 (1882) with approval in *Connick*, stating that the government's legitimate purpose was in "promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service."

"To this end," Justice Powell wrote in his separate opinion to *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."

Uncontradicted evidence in the present case demonstrates the extent of the black community's anger and resentment as well as the potential consequences.

Testimony revealed that the black community was prepared to go to great lengths to stop Berger's per-

formances. Witnesses testified that the Department's relationship with the black population[7] would suffer severely if Berger were allowed to continue his blackface shows. The results would be the loss of twenty years of hard won respect and trust. Other testimony placed a great emphasis on the potential for violence. As the trial court noted, "the potential impact on the Department's efficiency [was] both real and great." (See Appendix B at 37a).

This Court has stated: ". . . we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the extent that the destruction of working relationships is manifest before taking action."[8] *Connick v. Myers, supra*, at 153. This was the point of view adopted by the Department.

Many courts have noted that the disruptive potential of speech remains a vital component of First Amendment analysis in any public employment context after *Connick, See e.g. Curl v. Reavis*, 740 F.2d 1323, 1329 n. 5 (CA4 1984); *Argrc nryers v. Colberg*, 738 F.2d 55, 61 (CA1 1984); *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009, 1017 (CA5 1984) (en banc); *Berry v. Bailey*, 726 F.2d 670, 676 (CA11 1984); *McGee v. South Pemiscot School District*, 712 F.2d 339, 342-343, n.4 (CA8 1983); *Egger v. Phillips*, 710

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[7] Found by the trial court to constitute 54.8% of the population of Baltimore City.

[8] *cf. Perry Ed. Assn. v. Perry Local Ed. Assn.* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), (Proof of future disruption not necessary to justify denial of access to non-public forum on grounds that the proposed use may disrupt the property's intended function).

F.2d 292, 320, nn. 29-30 (CA7 1983) (en banc); *McKinney v. City of Elroy*, 705 F.2d 1110, 1115 (CA9 1983).

Even though the Fourth Circuit noted that under some circumstances disruption by employee speech of a public employer's external operations and important relationships might justify disciplinary action, the Court nevertheless held that those circumstances "in faithfulness to the first amendment principles cannot be found here." 779 F.2d at 1001.

The Court further found that the interests of the Department were only "perceived threats" and that a threatened reaction by offended segments of the public may not serve as justification for employer disciplinary action directed at the employee. *Id.*

This Court has never intended to strip a public employer of its ability to protect its operations and relationships, internal and external, from the effects of disruptive employee conduct or speech. The effect of the Fourth Circuit's decision is to do just that.

If a public employer cannot prohibit an employee from creating a disruptive situation that both the employee and the employer have a duty to prevent, the employer will be seriously impeded in its conduct of public affairs. The threat is particularly serious when the employer is a police department sworn to protect the liberties and properties of others and the employee is a police officer sworn to take enforcement action upon the discovery of crime. If, on the other hand, the employer can prohibit certain conduct, including symbolic expression, what are the guidelines under which it may exercise this authority? When is wearing theatrical makeup protected by the First

Amendment and when is it not? The questions posed are fundamental. Who will be responsible for the maintenance of relationships? The employer who cultivated and nurtured them through difficult years, and is, therefore, responsible for them, or those who happen to be employed by it. The difficulty posed by the facts of this case and the consequences of the Fourth Circuit's decision is so important to the operation of all public employers with special functions that it must be addressed and resolved by this Court.

II. THE APPROPRIATE CONSTITUTIONAL ANALYSIS TO APPLY TO CASES SIMILAR TO THE CASE AT BAR CONTINUES TO PUZZLE LOWER COURTS

The Fourth Circuit was particularly troubled by the problems presented by the unique facts of this case. The application of the *Pickering* balancing test, the Court noted, presented some threshold conceptual problems: "This particular controversy does not fit too neatly within the paradigmatic factual pattern out of which the *Pickering* test has developed." 779 F.2d at 997.

This Court also noted that *Pickering* may not provide an appropriate standard to be applied as a general rule:

> Because of the enormous variety of fact situations in which critical statements by [public employees] may be thought by their superiors. . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all statements may be judged. 391 U.S. at 569.

As the *Pickering* court found, "critical statements" are the heart of the balancing test. While critical statements are not found in the instant case, the underlying principle remains that the Court declined to develop a "bright-line" standard. Each case must be examined by the whole record. *Connick v. Myers, supra*, at 148.

The Fourth Circuit, nevertheless, found that *Pickering* provided the appropriate constitutional principles upon which to decide the instant case. The Court did note, however, that *Pickering* emerged from criticism and disagreement with governmental operations, in stark contrast to the issue presented here—noncritical, nonspeech conduct.

The Fourth Circuit further found that Berger's ". . . off-duty public employee speech has to be accorded the same weight in absolute terms that would be accorded comparable artistic expression by citizens who do not work for the State," 779 F.2d at 999. Such simply is not the law. As demonstrated herein, this Court has consistently recognized the right of a public employer to reasonably regulate employee conduct.

Pickering and its progeny were designed to deal with specific public employee/public employer conflicts in the First Amendment arena. Petitioners have shown through uncontradicted evidence that their prohibition was narrowly drawn to prohibit conduct by an employee that had a serious effect upon the Department's interests. Those interests could not and never would justify the Department's attempting to prohibit similar conduct by someone other than a police employee. In the employee/employer context, the Fourth Circuit has stated that because the government has this additional interest as employer, the

protected speech of public employees is less than that of the public at large when the competing interests clash. *Hickory Fire Fighter Ass'n v. City of Hickory, N.C.*, 656 F.2d 917, 920 (4th Cir. 1981). Accordingly, the Fourth Circuit appears to have contradicted themselves in their holding in the instant case.

From the inception, the Fourth Circuit was faced with a difficult situation. The Court considered the evidence and record, but as the Court indicated, its conclusion was based upon an uncertain and difficult interpretation of *Pickering* as applied to this case.

The Tenth Circuit ran into similar difficulty with the *Pickering* analysis in *Wilson v. City of Littleton, Colo.*, 732 F.2d 765 (1984). After the trial court found that Wilson's dismissal for violating an order to remove a black "mourning" band from his badge did not offend the First Amendment, in spite of Wilson's contention that his conduct was "symbolic" speech, *see, U.S. v. O'Brien, supra*, the Tenth Circuit affirmed the judgment, but on different grounds. The Tenth Circuit said that the trial court applied the wrong test—the *O'Brien* test. The Tenth Circuit found that although *Pickering* was the appropriate test the trial court should have used, Wilson had failed to show that wearing a black "mourning" band was a "matter of public concern." Therefore, the balance test need not be applied, and the dismissal need not be examined further.

This Court was faced with the same type of misapplication in *Connick v. Myers, supra*: "The District Court, and thus the Court of Appeals, as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent." *Id.* at 143.

Connick contended that it was unnecessary to balance Myer's competing interests, because the contested questionnaire concerned only internal office matters, and the speech was not upon a matter of "public concern."

This Court addressed the importance of these contentions:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, reflects both the historical involvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. *Id.* at 144.

As a result, this Court found that a *Pickering* analysis need not be applied when the speech of the employee cannot be fairly characterized as constituting speech on a matter of public concern. *Id.* at 147. Myer's dismissal did not offend the First Amendment and was upheld by this Honorable Court.

The instant case poses the open question of whether disruptive conduct can ever constitutionally serve as the basis for employer limitation under the First Amendment.

The issues in this case are clearly presented. By reversing the trial court's decision, the Court of Appeals has held that disruptive conduct that adversely affects and disrupts external relationships of a public employer is constitutionally protected. Nothing in this Court's precedents requires this result.

This Court corrected confusion among the lower courts on the matter of what constitutes public concern issues in *Connick*, as related to a *Pickering* analysis. Because of the confusion among the circuits regarding the appropriate constitutional analysis to apply in special circumstances of public employee/employer relationships, and because of the serious and unsettled question of federal law involved, this Honorable Court should grant certiorari and provide the lower courts with some guidance for their decisions in the future.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

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APPENDIX

APPENDIX A

ROBERT M. BERGER, APPELLANT, AND RAY FRANKLIN BARHIGHT, JR.,

Plaintiff.

versus

FRANK J. BATTAGLIA, Individually and as Police Commissioner, City of Baltimore and Baltimore City Police Department,

Appellees.

No. 84-1440

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge.

Argued January 9, 1985.
Decided December 20, 1985.

Barbara Mello, American Civil Liberties Union of Maryland for Appellant; Justin J. King (Benjamin L. Brown, City Solicitor; Ambrose T. Hartman, Deputy Solicitor; Millard S. Rubenstein, Assistant Solicitor on brief) for Appellees.

Before WINTER, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

PHILLIPS, Circuit Judge:

The issue is whether, consistently with the first amendment, the Baltimore Police Department could condition the continued employment of one of its police officers upon his cessation of off-duty public entertainment performances in blackface that members of Baltimore's black community

found offensive. In this action by the police officer against the Department under 42 U.S.C. § 1983, the district court, applying the balancing test prescribed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), as elaborated in *Connick v. Myers*, 461 U.S. 138 (1983), denied the claim, striking the constitutional balance in favor of the Department. Because, applying the same test, we strike the balance differently, we reverse and remand for further proceedings.

I

The essential facts, as agreed to by the parties on appeal, and as basically reflected in the district court's findings of fact, are as follows.

Before the events here in issue resulted in this lawsuit, plaintiff Robert M. Berger had been an officer in the Baltimore Police Department since December 1972. During much of his tenure with the Department he had also performed music during his off-duty hours, first at Old Shanytown, a tavern owned by his brother in the Highlandtown section of Baltimore, and later at other bars, clubs and taverns, mostly in the Baltimore area. His musical performance, in which he sings and plays various instruments, is built primarily around popular music of the first half of the twentieth century—music in which he has been interested since childhood, when his family and neighbors gathered at his parents' house for weekly sing-alongs. For the past several years the most prominent feature of Berger's act had been an impersonation of the late singer Al Jolson, which he performed in blackface makeup and a black wig after the manner of the originator. He typically performed to family audiences numbering between 100 to 200 people.

In none of his performances did Berger identify himself as a police officer; offer any comment on Department policies or operations; make any reference to any other member of the Department; nor claim to be speaking for or

in any way representing the Department. Although various media, in commenting on or describing his performance, referred to him as "the singing cop," that designation was, so far as the record reveals, theirs, not Berger's.

In his performances Berger's only purpose was to provide entertainment for willing listeners. He urged no conduct, incited no activity, made no derogatory or inflammatory remarks, advocated no lawlessness and sought no confrontation.

From at least 1979 Berger's superiors within the Police Department were aware of his musical activities, including the Al Jolson impersonation. On several occasions Deputy Commissioner William F. Rochford had introduced him to visitors as "the Department's Al Jolson." A member of the command staff (defined as officers of the rank of captain and above)—one Colonel Avara—made a practice of asking him to sing "Mammy" when he encountered him on the street, in full uniform. Numerous members of the command staff, including the deputy commissioner, had seen him perform in clubs and taverns. Prior to 1982, no member of the department had complained to him about the content of his act or suggested that he not perform it in blackface.

During this period, police department regulations permitted officers to engage in secondary employment in their off-duty hours, provided they obtained specific permission in advance. In December 1981 Berger was disciplined for having performed for pay without having sought or received the necessary permission. From that time until February 1982 he had continued to perform, but had received no money.

Early in 1982 Berger entered into an agreement with the management of the Baltimore Hilton Hotel to perform his act, including the Al Jolson imitation, in the B-100 Lounge, a nightclub located on the ground floor of the hotel. By the terms of the agreement Berger and a band

which he was to provide were to be given a two-week tryout for three nights per week, beginning February 7, 1982. If that tryout were successful, the engagement was to be extended an additional 10 weeks. Because of his earlier violation of Department regulations respecting off-duty employment, Berger was not to receive money for his performance, although the members of the band were to be paid.

Prior to the scheduled opening date, the hotel advertised Berger's performance in the Baltimore newspapers. The advertisements were illustrated by a photograph of Berger in his blackface makeup. They did not identify him as a police officer.

The sight of these advertisements offended many black citizens of Baltimore, especially members of the National Association for the Advancement of Colored People (N.A.A.C.P.), some of whose members resolved to express their disapproval of a white entertainer's appearing in blackface and, if possible, to prevent the performance from going on. One of these was Dr. Emmett C. Burns, regional director of the N.A.A.C.P. for the geographic area which includes Baltimore and the State of Maryland. At this time, Dr. Burns did not know that Berger was a city police officer. Burns' objection at this time was based simply upon the fact that, as he testified, he and others whom he represents considered any appearance by a white in blackface makeup to be "absolutely horrendous—a throwback to the days of the minstrels, when blacks were protrayed as clowns, simpletons, buffoons, apes and other animals of the lower kingdom." In this, as he also testified, he made no exception for portrayals of black persons by white persons in art forms such as Othello.

On February 7, 1982, when Berger arrived at the Hilton, he was met by two men, Dr. Wallace Gatewood and Adam Van Landingham, who introduced themselves as representatives of the N.A.A.C.P. and demanded that he not per-

form his Jolson imitation because it was insulting to blacks. After discussion with these two, Berger agreed to do his entire show, including the Jolson portion, without makeup in order to demonstrate the lack of racial content in the act. Following the performance he received a standing ovation from the entire audience of some 150 people, including Gatewood and Van Landingham. Both of these two expressed approval of plaintiff's act, and Van Landingham, a part-time talent agent, gave him a business card and suggested that Berger call him to discuss possible future bookings.

On February 8 Berger performed in blackface without incident, again receiving a standing ovation from a packed house. Gatewood and Van Landingham, however, had by now reversed their stand of the previous evening and objected to the act's being done in blackface.

On February 9 Dr. Burns and approximately 30 persons associated with the N.A.A.C.P. set up a picket line outside the Hilton to protest the continuation of the engagement. They were joined by Bobby Cheeks and eight members of the Baltimore Welfare Rights Organization, of which Cheeks was executive director. The pickets marched in a circle on the sidewalk, carrying placards stating their objections to the show.

As the time for Berger's performance drew near, some of the pickets or demonstrators entered the hotel and the nightclub itself, with the intention of preventing the performance. In keeping with the policy of the N.A.A.C.P., it was not then the intention of Dr. Burns and his group to resort to violence or other unlawful activity to achieve their goal. On the other hand, Mr. Cheeks and his followers were then prepared, according to Cheeks' testimony, to go onto the stage and stop the show, by physical force if necessary.

Whatever the actual intentions of these two groups, Sgt. William D. Lawson of the Department's Community Re-

lations Section, who was on duty at the Hilton that evening, had heard numerous rumors to the effect that blacks in the audience intended to storm the stage to prevent the show from going on, and that certain whites who wished to see the performance were prepared in that event to counter-attack. Although he never heard anyone directly threaten anyone else, Sgt. Lawson feared possible violence if these rumors materialized into fact. He therefore requested additional police assistance. In response to his request, some two dozen officers from the Tactical Squad and the Central District, plus wagons, were dispatched to the Hilton, under orders to remain on standby, out of sight and away from the Fayette Street (main) entrance to the Hotel unless they were needed for crowd control.

This redeployment of forces left eight posts in the city's Central District unmanned (but covered by personnel from adjacent manned posts, which "doubled up" their coverage) for approximately two hours. The police manpower available on the scene was, however, more than adequate to deal with any situation that might develop. Lawson's and the Department's primary concern on February 9 was that if the demonstrators were unsuccessful in stopping the performance on that evening, their numbers would increase geometrically on the evenings of subsequent scheduled performances. Ultimately, confrontation was averted when the Hilton management cancelled the show.

Following the events on February 9, the police department received a number of complaints from black citizens, including Dr. Burns and Mrs. Enolia McMillan, executive director of the Baltimore Branch of the N.A.A.C.P., objecting vehemently to a police officer's being permitted, as they saw it, to offer a public insult to members of their race. These complaints were a matter of serious concern to the Department, which had been engaged since the mid- to late-1960's in what Deputy Commissioner Bishop L. Robinson described as a "comprehensive, integrated community approach" to improving its previously strained re-

lations with the black citizens of Baltimore. The Department feared that its community relations efforts would be undermined by widespread outrage over Berger's performances. Consequently, Commissioner Frank J. Battaglia referred the matter to Deputy Commissioner Rochford for appropriate action.

At this time, Berger had been on light-duty status, assigned to building maintenance, since early 1979, when he had been injured in a line-of-duty automobile accident. On February 12, 1982, Commissioner Rochford ordered him to cease all public performances, in any capacity, while on light-duty status.

On receiving Commissioner Rochford's order, Berger consulted an attorney, who advised him that, in his opinion, the order was unconstitutional and who wrote to Commissioner Rochford advising him that Berger's best medical interests were not jeopardized by his off-duty activities.

On February 19 Berger was summoned to the Department's Medical Section, where he was called to see the attending physician ahead of 16 other persons who were in line before him and, without medical examination or consultation more recent than December 1981, was ordered to return to full duty.

On February 19 Berger was ordered by his commanding officer, Captain Walter T. Jasper, to cease appearing in public wearing blackface on pain of being found in violation of the Department's rule prohibiting activity on the part of a member of the Department "that tends to reflect discredit upon himself or upon the Department." Captain Jasper issued this order on instructions from Commissioner Battaglia.

On February 23, Berger applied, on a form provided by the Department, for permission to receive pay for his performances. Although his sergeant and his lieutenant approved his application, Captain Jasper and Deputy

Commissioner Robinson denied it. Sometime later, following an altercation with a fellow officer, Berger was stripped of his police powers and assigned to compiling crime statistics.

Following the events at the Hilton Hotel, Berger continued to perform in blackface, without incident or complaint, at various locations in Baltimore City and Baltimore County. The Department has conceded that as of the time of trial, there had been no significant impairment of the Department's relations with the black community. Neither had there been any disruption of the Department's internal harmony and operations resulting from any of Berger's performances in blackface.

Berger brought this action, under 42 U.S.C. § 1983, against the Department and Battaglia, its Commissioner, claiming deprivation under color of state law, of rights secured under the first and fourteenth amendments. Specifically, he alleged violation of free speech rights by the order requiring him to cease public performances in blackface, and the denial of his request for permission to perform for compensation while off-duty in reprisal for his past performances. A co-plaintiff, Barhight, joined the action, alleging that the same Departmental acts deprived him of his rights under the first and fourteenth amendments to see and hear the prohibited performances.

The case was tried to the court. In a careful and comprehensive memorandum opinion, the district court analyzed and denied the plaintiffs' claims and directed entry of judgement for defendants. In summary, the court, applying the constitutional balancing test prescribed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), first determined that Berger's speech was "upon a matter of public concern" and therefore was entitled to first amendment protection unless, on balance, the Department's interests as a public employer in avoiding the threat posed by the speech to the efficient performance of its duties

outweighted the first amendment values involved in the particular speech. In the balancing calculus, the court ascribed less than core first amendment value to merely artistic as distinguished from political content of Berger's public entertainment; found no resulting internal disruption of Departmental operations; but ascribed overpowering weight to the Department's interest in avoiding future diversions of its resources to cope with threatened disruptions by offended members of Baltimore's black community of comparable Berger performances, and in maintaining the Department's hard-earned good relations with that formerly hostile black community. In the course of that analysis, the court rejected any notion that the Hilton performance and its associated threat to public order would alone have justified the Department's cessation order, since that incident occurred at a time when Berger was not even known by the demonstrators to be a public employee and would presumably have caused the same diversion of resources had he not been. The court therefore considered only those Departmental interests concerned with the threat of future disruptions of order and harmonious relationships in striking the constitutional balance in favor of the Department as public employer.

This appeal followed.

II

As the district court observed, application of the *Pickering* "balancing test" to the facts of this case presents some threshold conceptual problems. This particular controversy does not fit too neatly within the paradigmatic factual pattern out of which the "*Pickering* test" has developed.

In that pattern the employee speech has invariably involved some form of criticism or questioning of the public

employer's policy,[1] or of its specific actions,[2] or of supervisory personnel[3] expressed either privately to the employer[4] or publicly.[5] From the public employer's perspective in this pattern, the threat to public employer interests posed by such speech has invariably been seen as the direct disruption of employment relationships, hence of internal efficiency, naturally flowing from employee insubordination or disloyalty.

The *Pickering* "balancing test" has therefore been developed in a context where the conflicting interests being assessed were, on one hand, those of a citizen in being free to remain openly critical of government notwithstanding it was his employer and, on the other, those of his public employer in being able by appropriate disciplinary action to avoid disruption of its internal operations. While no one could contend that application of the test even in that paradigmatic fact pattern has always been easy,[6] that pattern does at least pose the clash of public employee and public employer interests in employee speech rights in its most direct and easily identified form: the employee's right to criticize or disagree with governmental operations versus the governmental interest in avoiding the internally disruptive effect of the very criticism or disagreement.

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[1] *Pickering v. Board of Education*, 391 U.S. 563 (1968) (policy respecting revenue proposals); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (allegedly racially discriminatory policies).

[2] *Connick v. Myers*, 461 U.S. 138 (1983) (transfer of claimant; application of political pressure to employees).

[3] *Connick v. Myers*, 461 U.S. 138 (questioning confidence in and reliability of specific supervisors).

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (in privately arranged meeting with supervisor).

[5] *Pickering v. Board of Education*, 391 U.S. 563 (open letter to newspaper).

[6] See, e.g., *Connick v. Myers*, 461 U.S. 138 (5 to 4 decision as to whether particular speech was protected).

Here, at odds with the paradigmatic *Pickering* pattern, the employee speech was not criticism of or disagreement with governmental operations, and the governmental interest assertedly threatened by the speech was not internal employment relationships and operations. Instead the speech here was a form of artistic expression wholly unrelated in content to the public employer or its operations, and the threat it assertedly posed to employer interests was not internal disruption by the speech itself, but external disruption by third persons reacting to the speech.

While the *Pickering* test therefore emerged from a general fact pattern not perfectly replicated by that presented here, its underlying constitutional principles are nevertheless perfectly apposite and necessarily controlling here as well. To those principles we therefore turn in order to adapt and apply them to the conflicting interests involved in this controversy.

III

The basic principle, representing a fairly recent revision of the "unchallenged dogma" of most of this century, is that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. at 142, 143. Not all public employee speech is protected, however, against this particular form of state action. Only that speech which both lies within the general protection of the first amendment (e.g., is not obscene) and is "upon a matter of public concern" may be entitled to that particular protection. Public employee speech not on matters of "public concern" simply enjoys no protection against public employer disciplinary action, though it may be protected against other forms of state action. *Id.* at 147. As to such speech, the state's interest as public employer in managing its personnel and internal operations is sufficiently weighty that the public employee's first

amendment rights in the speech are no greater than would be those of a private employee.
Ibid.

Even speech on matters of public concern does not enjoy absolute protection against public employer disciplinary action. The public employer's "interest in the effective and efficient fulfillment of its responsibilities to the public" may be so threatened by the speech that disciplinary action, including discharge, may be justified. *Connick*, 461 U.S. 149-54. Whether disciplinary action directed at public employee speech on matters of public concern is justified in a particular case requires "particularized balancing" to reach the "most appropriate possible balance of the competing interests." *Id.* at 150.

The issues of whether particular employee speech is upon a matter of "public concern" and, if so, whether, on balance its value outweighs any competing interest of the public employer in avoiding disruptive effects of the speech, are both questions of law, not fact. As such they must be resolved by courts exercising independent judgment in application of first amendment principles. *Id.* at 148 n.7 150 n.10. For our immediate purposes, this means that we freely review the district court's resolution of those constitutional issues here, applying our own independent judgment to the established historical facts which, as indicated, are not in any significant dispute on this appeal.

A.

The first question is whether Berger's "speech" was, within contemplation of the *Pickering* test, upon a matter of "public concern," hence subject to qualified first amendment protection as against any public employer disciplinary action. On this, the district court held that the speech, as a form of artistic expression presented to obviously interested public audiences, was, for the purpose at hand, "on a matter of public concern." The defendants do not on

appeal challenge that basic determination, and we agree with it. But because, as the district court observed, the speech here—entertainment—is not the type directly considered in the paradigmatic *Pickering* pattern, we elucidate somewhat upon the basis of our agreement.

Pickering, its antecedents, and its progeny—particularly *Connick*—make it plain that the "public concern" or "community interest" inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee—most typically, a private personnel grievance. *See Connick*, 462 U.S. at 148-49 ("upset with the status quo"; "dispute over [employee's] transfer"; "controversy with" employer; "employee's dissatisfaction"; "complaints over internal office affairs" used as descriptives of speech on matters found not of public concern). That is to say, the purpose of the inquiry is to prevent turning every public employee expression of private grievance into a constitutional case, *Id.* at 149, while at the same time enforcing the new dispensation, dating back at least to *Keyishian v. Board of Regents*, 385 U.S 589, 605-06 (1967), that by accepting public employment a citizen does not absolutely forfeit his first amendment right to express himself freely upon "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. The focus is therefore upon whether the "public" or the "community" is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

This of course requires subtle judgement. For under this general principle, an employee's expression of grievance

about an employer's personnel actions, though obviously related at bottom to the conduct of government operations, may nevertheless be viewed only as a private grievance. *See Id.* at 148-49; *but see Id.* at 163-64 (Brennan, J., dissenting) (employee expressions about internal operations of governmental office are necessarily on matters of "public concern"). On the other hand, employee criticisms of employer policy made privately to the public employer may nevertheless be on a matter or "public concern" where the content and the context reveal that the expression is not merely that of a private grievance. *See Givhan*, 439 U.S. 410 (privately criticizing allegedly racially discriminatory policies of public employer).

Applying this test, Berger's performances clearly were not purely personal expressions of no concern to the community. Rather, they constituted speech upon a matter of obvious public interest to those considerable segments of the community who willingly attended and sometimes paid to see and hear them. That the content was sheer entertainment—presumably neutral as to any political or even social views—does not of course take them outside first amendment protection. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

The speech at issue was therefore entitled to protection against the challenged actions of the defendants unless those actions could be justified under the Pickering balancing test. To that we now turn.

B.

As was proper, the district court first assessed the value, from the first amendment perspective, of Berger's "speech." The court found the artistic expression involved to be of less value than that found in speech on political matters and public affairs, the "core" values protected by the first amendment.

We do not disagree with the general assessment that entertainment ranks lower on the scale of first amendment values than does pure political debate. But we disagree with the district court's further assessment that in the Pickering calculus, Berger's artistic expression should not be viewed "as particularly important, or worthy of a great deal of protection."

We think, instead, that in assessing its value for *Pickering* balancing purposes, this type of off-duty public employee speech has to be accorded the same weight in absolute terms that would be accorded comparable artistic expression by citizens who do not work for the state. And that value, traditionally, has been accorded a great deal of weight, certainly not far below the value accorded political and social commentary and debate. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

We do not, as did the district court, read the *Pickering, Givhan and Connick* Courts' emphasis on the importance attached to speech on matters involving public affairs and the operations of government as implying that employee speech on other matters lying within the first amendment's general protection should be accorded little weight in the public employee speech balancing process. That emphasis in those cases we think simply reflected the fact that that was the type of speech involved in each, and that in content such speech does indeed embody core first amendment values.

But the basic principle is that except as qualified by the special exigencies of the employment relationship, public employees retain the full panoply of first amendment rights enjoyed by all citizens. One of the fundamental rights secured by the amendment is that of free, uncensored artistic expression—even on matters trivial, vulgar, or profane. See *Winters v. New York*, 333 U.S. 507 (1948); *Edwards*

v. Habib, 397 F.2d 687 (D.C. Cir. 1968); *see also Connick v. Myers*, 461 U.S. at 157 N.1 (Brennan, J., dissenting).

We therefore accord Berger's speech the value, in absolute terms, that it would be accorded in any citizen, undiminished by the fact here of his state employment. See *Id.* at 147. ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"); *see also Id.* at 157 (Brennan, J., dissenting). In the balancing process, the only significance that the particular content of speech has is in the degree to which it tends to jeopardize the public employer's capability to perform its duties effectively and efficiently. *See Id.* at 152 ("clear potential for undermining office relations" found in specific content of employee speech").

As indicated, the district court then found Berger's speech, which it had assessed as not "particularly important" in first amendment terms, outweighed in the balance by the Police Department's reasonably perceived interests in avoiding future disruptions both of its resources and of its harmonious relationships with the black community. With all respect to the district court's careful assessment, and with considerable sympathy for the beleaguered police department's dilemma, we simply do not agree with this final striking of the balance.

It is at least arguable from *Pickering*, its antecedents, and its progeny, that the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, by the speech itself, of the public employer's internal operations and employment relationships. Certainly this could be deducted by looking at the specific results as well as the critical language of the principal decisions applying the post-*Keyishian* dispensation in public employee-first amendment cases. *See Branti v. Finkel*, 445 U.S. 507 (1980) (discharge for pure patronage reasons, with no showing

of internal disruption by virtue of political association itself, impermissible); *Pickering*, 391 U.S. 563, 570 (discharge impermissible where "no question of maintaining either discipline . . . or harmony" involved and no showing of need for "personal loyalty and confidence" in employment relationship); *Givhan*, 439 U.S. 410, 415 n.4 (discharge impermissible unless shown that private confrontation with immediate superior threatened "institutional efficiency"); *Connick*, 461 U.S. 138, 151 (discharge permissible where public employer reasonably viewed employee speech as causing a "mini-insurrection").

Here there is no suggestion of the kind of internal disruption which the Court in the decisions above noted may be thought to have considered the only sort justifying disciplinary action by public employers. Indeed, the district court expressly found, and the defendants concede, that no such disruption was caused by Berger's speech.

But we need not decide whether only internal disruption can ever suffice as a justification for public employer disciplinary action directed at employee speech. Assuming that under some circumstances disruption by employee speech of a public employer's external operations and important external relation ships[7] might justify disciplinary action, we hold that those circumstances cannot in faithfulness to first amendment principles be found here.

Here not only was the perceived threat of disruption only to external operations and relationships, it was caused not by the speech itself but by threatened reaction to it by offended segments of the public. Short of direct incitements to violence by the very content of public employee speech (in which case the speech presumably would not be within general first amendment protection), we think

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[7] *Cf., e.g., Waters v. Chaffin*, 684 F.2d 833, 839 n.12, 840 (11th Cir. 1982) (possible disruption of external opera tions); *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (same).

this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employee disciplinary action directed at that speech.

Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the "heckler's veto," imposed by the successful importuning of government to curtail "offensive" speech at peril of suffering disruptions of public order. *See Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949). Government's instinctive and understandable impluse to buy its peace—to avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of public—is a recurring theme in first amendment litigtion. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *Rowan v. Post Office Department*, 397 U.S. 728 (1970); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). Through this "veto" has probably been most frequently exercised through legislation responsive to majority sensibilities, the same assault on first amendment values of course occurs when, as here, it is exercised by executive action responsive to the sensibilities of a minority.

As indicated, the special dilemma presented for the Police Department here can only excite judicial sympathy. One may well feel—as undoubtedly did the Department—that a little forbearance on the part of Berger, given the special circumstances of his public employment and the hard-earned and presumably still tenuous trust of the black community, would be in order. One may also wonder—as undoubtedly did the Department—whether the outrage being represented to it as that of the "black community" was truly that widely shared and whether a better and more effective response might have been continued public

non-violent demonstrations of contempt and outrage by those sufficiently offended.

Nevertheless, however real the dilemma, we think and hold that the Department—after all an agency of the state charged with enforcing the first amendment as well as with maintaining public order—could not respond as it did consistently with the first amendment, once Berger had declined to forbear and stood on his constitutional rights. Those rights of course exist in the unforbearing as well as the forbearing and have in fact undoubtedly been hammered out largely in behalf of the temperamentally unforbearing who are fortunate enough to live in a society that protects their right immediately to "stand on their rights."

An appropriate Department response, perhaps the only one, wholly consistent with the first amendment, would have been instead to say to those offended by Berger's speech that their right to protest that speech by all peaceable means would be as stringently safeguarded by the Department as would be Berger's right to engage in it. We have no illusions that this would have been a satisfactory response, nor that it may not have led to some of the very disruption of operations and resources that the Department feared. But it would not only have been the most sound response constitutionally, it would have been an eminently practical one for any of those offended by Berger's speech who were at least willing to consider the wider implications of the principle for which they at least implicitly contended: that offensive speech may properly be curbed by exerting this form of leverage upon public employers. But this is a device as readily seized upon by one group in society as another, and is one more readily available in most times to majority than to minority groups. There are of course many illustrations of this, but a particularly apt one for this purpose is that considered by the Fifth Circuit in *Battle v. Mulholland*, 439 F.2d 321 (5th Cir. 1971). There a black police officer in a small Missis-

sippi town had been discharged by the town officials because of the town fathers' concern, prompted by complaints, and probably justified, that his conduct would exacerbate an already tense racial situation in the town. Noting that this "type of restrictive response, based on theoretical reactions by others" to conduct protected by the first amendment had "long been condemned," the court held the discharge constitutionally impermissible. We think that the principle applied there is precisely that one applicable here, through figuratively, the shoe here is on the other foot.

IV

In summary, we hold that Berger's conduct in performing public entertainment in blackface was constitutionally protected speech and that the defendants as public employers were not justified by any sufficiently weighty countervailing state interest in taking disciplinary action either punishing Berger for that conduct or chilling in any way his continuation of it. We therefore vacate the district court's judgment dismissing the claims of Berger and Barhight and remand for further proceedings consistent with this opinion.

In remanding, we make these observations about the proper scope and conduct of further proceedings.

As indicated, Berger actually alleged two specific violations of his constitutional rights: the order specifically and narrowly prohibiting his further public appearances in black face and the later order denying him the right to perform at all for compensation.

Our decision necessarily determines that the order preventing future appearances in blackface was specifically violative of Berger's first amendment rights. There remains on this only the issue of the appropriate remedy for that violation.

As to the order denying Berger the right to perform

for compensation, we think this must be reexamined by the district court in light of our decision. The district court expressed itself as being unclear as to whether Berger may have abandoned this particular claim of violation, but nevertheless addressed it. It was then disposed of in rather summary fashion. Although the Department has also advanced other reasons for the order, the court specifically found that the purpose of this order was to "stop future performances that might anger the black community." On this basis, the court upheld the validity of the order on the same basis it had upheld the "blackface" order: that Berger's conduct was not protected against appropriate disciplinary action, and that under the circumstances, this was appropriate disciplinary action, particularly in view of Berger's refusal to obey the "blackface" order.

Our decision necessarily determines that the Department could not constitutionally do this for the purpose alone of punishing or chilling Berger's protected conduct. But the district court's memorandum decision leaves us unclear as to whether it also specifically ruled out any of the other reasons advanced by the Department (e.g., excessive medical leave, history of performing at establishments serving alcohol) as independently valid reasons. If upon remand the district court considers that this is an open issue, it may permit the defendants to present a defense based upon the "but for" principle of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). If, however, the court considers that is has already ruled against any such defense (a finding that we could not hold clearly erroneous on this record) the only issue remaining for resolution as to this particular claim is that of remedy.

As to the nature and extent of any monetary remedy to which Berger may be entitled in respect of either of the specific claims of violation, we of course express no opinion. He is obviously entitled to appropriate declaratory and injunctive relief conformable to this decision.

The district court did not allude separately to the basis of Barhight's claim that the Department's action deprived him of first and fourteenth amendment rights to hear and see Berger's forbidden performances. Because that claim is obviously derivative of and dependent upon the existence of Berger's protected interest, we assume that Barhight's claim was found to have failed on the same basis that Berger's was rejected. So far as we can perceive, defendants have raised no independent defenses to Barhight's claim, which persumably is only for appropriate declaratory and injunctive relief.

REVERSED AND
REMANDED FOR
FURTHER PROCEEDINGS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. B-82-880

ROBERT M. BERGER and RAY FRANKLIN BARHIGHT, JR.
v.
FRANK J. BATTAGLIA
Individually and as
Police Commissioner
City of Baltimore, and
BALTIMORE POLICE DEPARTMENT

MEMORANDUM OPINION

One of the plaintiffs herein, Robert M. Berger, an officer in the Baltimore City Police Department, has sued the Department and its Commissioner, Frank J. Battaglia, under 42 U.S.C. § 1983 for violation of his civil rights. Berger alleges that the Department has violated his first amendment right to freedom of speech by prohibiting him from performing in "blackface" makeup, an imitation of the late entertainer Al Jolson. Berger also claims that the Department has unlawfully denied him permission to perform for compensation during his off-duty hours when other similarly-situated police officers were permitted to do so. That denial, Berger contends, was in reprisal for his past exercise of his right. Additionally, the other plaintiff, Ray Franklin Barhight, Jr., claims that the Department has violated his first amendment rights by unlawfully preventing him from hearing and seeing Berger's performances. The plaintiffs seek: 1) a declaratory judgment that Berger has first and fourteenth amendment rights to perform, and Barhight first and fourteenth amendment rights to view Berger's performances; 2) a declaratory judgment

that the Department's prohibition of Berger's performances or punishing Berger for those performances is unconstitutional; 3) various injunctive remedies; and 4) $10,000 in damages as compensation for violations of the plaintiffs' civil rights.

I. FACTS

Robert M. Berger is a white officer in the Baltimore City Police Department, and is presently assigned to administrative duties in the Tactical division. A veteran of eleven years, Berger has served as a patrolman, and in other administrative capacities. Officer Berger's hobby is music. Coming from a family of entertainers, he has been singing since he was about seven years old. Berger first started performing publicly in Vietnam. During the last few years he has been singing professionally in various night clubs in the Baltimore area.

Berger began his professional singing career in his brother's nightclub, Old Shantytown. Later, as his singing career progressed, he appeared in a variety of local arenas—Elks Clubs, Knights of Columbus Halls, and local nightclubs—where he played to audiences of 100 to 600 persons whose ages usually exceeded 35 years. Berger performed with a band, and his act typically included several sets of dance music and a 1950's musical revue.

Sometime during his career, Berger added to his act an Al Jolson revue. In that portion of the act, Berger would imitate the late Jolson in costume, manner, and material. As Jolson had done, Berger would put on "blackface" makeup to darken his entire face, except his eyes and lips. The eyes and lips were highlighted with white makeup to give the appearance of abnormally large lips and white eyes. Like Jolson, Berger would wear a curly black wig, white gloves, and a tuxedo. His material, also that of Jolson's, was comprised of songs such as "Mammy" and "Waitin' for the Robert E. Lee" that were rooted in, or

influenced by, the pre-civil war Southern black culture. The Al Jolson portion of Berger's act was the most popular.

Berger's professional singing career was not entirely separate from his career as a police officer. Although, while entertaining, Berger never identified himself as a police officer, he appeared on local television billed as "the singing cop." In addition, Berger's talents, including those involving Al Jolson, were recognized within the Department. On several occasions Deputy Commissioner William F. Rochford introduced Berger to visitors as "the Department's Al Jolson." A Department Colonel, when encountering Berger on foot patrol, often asked Berger to sing "Mammy." Numerous other members of the Department's command staff had seen Berger perform in "blackface" in various Baltimore area clubs. Berger also participated in and helped found the police department band, but never performed his Jolson act while with that band. Commissioner Battaglia had seen Berger sing with the police band when it performed for the Sons of Italy at the Commissioner's request. No Department official had ever complained about the content of Berger's performances before the incidents that led to this litigation.

Berger's singing career first began to conflict with his police department employment in 1981. Previously, Berger had asked the Department Legal Advisor's office about the propriety of his performing in establishments that served alcoholic beverages, because Departmental regulations prohibited secondary employment in such places. Charles F. Milland of the Legal Advisor's staff issued a letter to Berger on Departmental stationary dated October 24, 1978, stating that nothing in the regulations prohibited Berger from performing in establishments serving alcohol, so long as Berger was not compensated for his services. Sometime in 1981 Berger began conducting, for compensation, a sing-along routine at Tom Jones, a local nightclub. During his engagement at Tom Jones, the Department's Internal Affairs Division investigated Berger. After inves-

tigation, the Department disciplined Berger and ordered him to stop singing at Tom Jones because he lacked the secondary employment slip required by Department regulations. Berger had not applied for the necessary slip because the process of obtaining permission was too laborious; he would have been required to apply and reapply for permission to perform for pay each time he worked at a different nightclub.

Berger resolved the conflict between his singing career and Departmental regulations by continuing to perform, but refusing any compensation. Friction between the Department and Berger abated until February of 1982. Berger had been performing his act, including the Al Jolson material, at the Four Seasons Supper Club. While at the Four Seasons, representatives of the Hilton in downtown Baltimore approached Berger and the band and asked if they would appear in the Hilton's nightclub. Berger and the hotel agreed that he and the band would perform at the Hilton three nights a week on a two-week trial basis. If the two-week trial period proved successful, the group would be guaranteed a ten-week engagement. The opening shows were scheduled for February 7-9, 1982. The band would be paid, but Berger would not be.

To publicize the show, the Hilton Hotel advertised in Baltimore's major newspapers. The advertisement included a sketch of an Al Jolson figure in full costume. The show was billed as the "Al Jolson Revue," and Berger's name appeared in the ad, although he was not identified as a Baltimore City police officer. On Sunday, February 7, 1982, Berger opened at the Hilton. Dr. Wallace Gatewood and Adam Van Landingham, introducing themselves as members of the National Association for the Advancement of Colored People (NAACP), met Berger on his arrival at the hotel that night, and demanded that he not perform the Jolson act because it demeaned blacks. After a discussion of Al Jolson and stereotypical portrayal of blacks, Berger offered to do his Jolson act without makeup. That

night Berger performed Jolson without props and makeup before a capacity crowd of about 150 people. At the end of the Jolson performance, he received a standing ovation. After the show, Van Landingham and Gatewood stopped Berger to express their approval. Van Landingham, a part-time talent agent, gave Berger his business card and suggested that Berger call him about future employment.

On Monday, February 8, 1982, Berger again played to a capacity crowd at the Hilton. He again encountered Van Landingham and Gatewood before his performance. But, in contrast to the preceding night, both were cool toward Berger. Van Landingham warned Berger not to do the show in "blackface." Berger, however, performed Jolson in "blackface," and again received a standing ovation.

The following night, February 9, the Hilton lounge was filled by 8:14 p.m. Before Berger's 9 p.m. show, the atmosphere became increasingly tense. Sometime before the scheduled hour, demonstrators arrived outside the Hilton and began to picket in protest of Berger's Al Jolson routine. Dr. Emmett C. Burns, Region VII Director of the NAACP, the Enolia McMillan, Executive of about 30 protesters. Bobby Cheeks, a local activist, led another group of eight demonstrators. About an hour after the demonstrators had arrived, they were doused with liquid from an upper floor of the hotel. Shortly thereafter, several demonstrators decided to enter the Hilton lounge and attempt to stop the show. A group including McMillan, Burns, and Cheeks entered the nightclub. The lounge management informed them that they were required to buy a beverage to remain in the lounge. The demonstrators purchased beverages, viewed a portion of the dance set, and left the lounge.

The demonstrators' presence in the lounge precipitated conversations between them, the Hilton management and owner, and Sergeant William D. Lawson of the Police Department's Community Relations Section. The protes-

ters expressed their displeasure at the Jolson act, their views on the act's portrayal of blacks, and their fears that they would be attacked. Sergeant Lawson had learned from the hotel management that a "white rights" organization was in the hotel, and planned to insure that the Jolson show would go on as scheduled. Sensing that the protesters would attempt to stop the show, and fearing violence, Lawson told the demonstrators that they would be arrested if they, in any way, breached the peace. Despite this warning, Cheeks and the more militant group of protesters prepared to attack the stage if the Jolson act proceeded. Sergeant Lawson requested additional police assistance, and Central District dispatched vehicles and about two dozen officers to the Hilton Hotel area, leaving other sectors of the District undermanned.

In the meantime, Berger had completed his second set of dance music which immediately preceded the Jolson set. At the end of this set, and after learning of possible resistance from the protesters, Berger announced that he would be performing the Jolson act "blackface," and suggested that anyone who might be offended should leave. Berger then returned to his dressing room where he met some police officers and the Hilton management, and the hotel's owner told him of the extent of the problem. Before the Jolson set commenced, the Hilton management cancelled the show and closed the lounge.

Following the events of February 9, 1982, the Department received several complaints from black citizens, including Burns and McMillan. The complainants objected vehemently to a police officer being permitted to insult blacks publicly. The Department feared that Berger's continued peformances would produce widespread outrage and undermine its community relations efforts. Consequently, Commissioner Battaglia referred the matter to Deputy Commissioner Rochford for investigation. On February 12, 1982, Rochford ordered Berger to cease all public performances, in any capacity, while on light duty status.

Berger had been on light-duty status, assigned to building maintenance, since early 1979, when he was injured in a line-of-duty automobile accident.

Upon receiving Rochford's order, Berger consulted an attorney who advised him that the order was unconstitutional, and who wrote to Rochford informing him that Berger's off-duty activities would not affect his health or performance as a police officer. On February 19, 1982, the Department ordered Berger to report to its Medical Section. On the basis of results of test conducted in December, the Department ordered Berger to return to full duty. Also on February 19, Berger's commanding officer, Captain Walter T. Jasper, acting with Commissioner Battaglia's approval, ordered Berger to cease appearing in public wearing "blackface" makeup.[1]

On February 23, 1982, Berger applied for permission to receive pay for his performances. Although his Sergeant and Lieutenant approved his application, Captain Jasper and Deputy Commissioner Bishop L. Robinson denied it. The reasons given for denial were: (1) Berger's violation of the order not to appear in "blackface" while his case was under investigation; (2) Berger's excessive use of med-

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[1] The Order reads in its entirety:

Rule 1, Conduct, prohibits activity on the part of a member of the Department that tends to reflect discredit upon himself or upon the Department.

It has come to the attention of the Department that you have engaged in off-duty activity which involves your performing in public wearing "blackface." This activity has become the subject of tremendous negative reaction from members of the public who perceive this to be demeaning to the back race. Specific criticism of the Department has resulted from the activity.

Accordingly, you are hereby specifically directed and ordered to cease and desist from appearing in public performances wearing "blackface." Failure to abide by the above will result in the institution of disciplinary action against you.

Exhibit B. *Complaint.*

ical leave; and (3) Berger's history of performing at establishments that served alcohol, which conduct violated Departmental regulations. Sometime later, Berger was involved in an altercation with a fellow officer. Following this incident, the Department ordered him to its Medical Section for psychiatric evaluation. Subsequently, Berger was relieved of his police powers and assigned to compile crime statistics. Since the events of February 9, 1982, Berger has continued to perform his Jolson act in "black face."

II. CONCLUSIONS OF LAW

Plaintiffs Berger and Barhight claim that the Department violated their rights guaranteed by the first amendment by preventing Berger, who was prepared to perform, from entering the corridors of the Hilton on February 9. Although asserted in the complaint, this claim has apparently been abandoned as it was reiterated neither in the pretrial order, nor at trial or argument. For the sake of completeness, the claim will be addressed. As the plaintiffs have recognized, the Hilton management, and not the Department, cancelled the February 9 show. The Department, and Sergeant Lawson, did not improperly influence the Hilton's decision. Based on the Department's accurate and impartial assessment of the situation, the Hilton management consciously and voluntarily decided to close the lounge and cancel the remainder of the show to avoid violence. This was the only reason that Berger was not permitted to continue his performance. The evidence indicates nothing to the contrary. Thus, the necessary element of Departmental causation is lacking and the claim must fail.

Secondly, the plaintiffs claim that the February 19, 1982 order prohibiting Berger from performing in "blackface" violates their first amendment rights. At issue is whether Berger's "blackface" portrayal of Al Jolson is constitu-

tionally protected speech, and if so whether the Department has a compelling interest permitting regulation. First amendment rights of a governmental employee, including a policeman, are the product of two competing interests. On the one hand is the employee's interest, as a citizen, to be free from governmental interference in commenting on matters the subject of which is constitutionally protected. Coupled with this is the public's interest in the information that the employee wishes to present. On the other hand is the government's interest, as an employer, in regulating the speech of its employees. Because the government has this additional interest as employer, the protected speech of public employees is less than that of the public at large, when the competing interest clash. *Hickory Fire Fighters Ass'n v. City of Hickory, N.C.*, 656 F.2d 917, 920 (4th Cir. 1981).

The Supreme Court, in *Pickering v. Board of Education*, 391 U.S. 563 (1968), set the formula for determining the respective rights when the government's interest as an employer conflicts with the employee's first amendment rights. In *Pickering*, the plaintiff, a school teacher, was fired for writing a letter to the editor of a local newspaper in which he criticized the school board's budgetary priorities. Recognizing that the State has a greater interest in regulating the speech of public employees than in regulating the speech of citizens in general, the Court found that in certain situations a public employee may be disciplined for otherwise protected speech without offending the first amendment. However, because Pickering's speech related to a matter of general public concern, and because his interest in commenting on the issue and the public's interest in having the speech protected outweighed the interests of the government in promoting the efficiency of its public services, the speech was protected from regulation. *Id.* at 568.

Pickering differs, however, from the instant case. There, the speech at issue involved public criticism of the em-

ployer. Here, Berger's Speech is not a direct attack on the police department, but rather involves off-duty conduct that is only remotely related to his employment, if at all. Thus, *Pickering* is of limited applicability in determining which factors must be considered and the respective weight to be accorded to each factor. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415 n. 4 (1979); *Kelly v. United States Postal Service*, 492 F. Supp. 121, 128 (S.D. Ohio 1980). Moreover, applying the Pickering formula to the artistic or entertainment worlds is particularly difficult. However, these distinctions do not change the nature of the test. Deciding whether the government can regulate the actions of a public employee involves balancing the interests of the employee and the public against the interest of the government as employer. A balancing approach must be used whether the actions at issue consist of speech related to employment, *Pickering, supra*, (speech unrelated to employment); *Van Ooteghem v. Gray*, 628 F.2d 488, 192 (5th Cir. 1980) on *rehearing*, 654 F.2d 304 (1981), *cert. denied*, 455 U.S. 909 (1982) (county treasurer's advocating gay rights); conduct including speech, *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983) (police officers' removing American Flag from uniforms); or, conduct that implicates other fundamental rights, *Shuman v. Philadelphia*, 470 F. Supp. 449, 459 (E.D.Pa. 1979) (police officer's sexual behavior).

In applying the balancing test, on one side of the scale is the interest of the government as employer in promoting the efficiency of the public services it provides through the employee. In this case, the evidence reveals three elements that might weigh in favor of the Police Department: (1) the Department's interest in regulating speech that affects an employee's ability to perform his job; (2) an interest in preserving intra-Departmental harmony; and (3) an interest in avoiding impairment of traditional Departmental functions.

The first element, the effect of the speech on Berger's performance, can be eliminated from consideration. Because of an altercation related only tangentially, if at all, to this case, the Department has relieved Berger of his patrol duties and has reassigned him to clerical duty in the Department's statistical division. Berger has not requested any relief that would return him to active duty, and there was no indication at trial as to when, if ever, Berger would return to patrol duty. Although Berger was a patrolman when the Department ordered him to stop performing in "blackface," the order of February 19, 1982 continues to apply as to his current assignment. In assessing the constitutionality of the Department's order, therefore, only its application to Berger as a clerical employee is relevant. In this light, Berger appearing in "blackface" does not impact on his ability to perform his duties as a statistical clerk. This is not to express any opinion on the outcome of the balancing test were Berger an active police officer. Rather, this Court is utilizing the present factual situation for purposes of the balancing test.

Next, the Department contends that Berger's conduct negatively affects the internal harmony of the Department. Although some evidence indicates that Berger's "blackface" routine does not meet with the approval of black police officers, the more credible evidence shows the Department's position lacks merit. No impact on the Department's internal harmony occurred before the Hilton Hotel incident, even though Berger continually performed in "blackface." Additionally, Berger's conduct has not affected the Department internally since the Hilton incident, even though Berger has continued to perform in "blackface." Moreover, although black officers may react negatively to Berger's Jolson routine, it would not be his conduct while on duty that would fuel their feelings. Nothing in the evidence show Berger to be a racist; in fact, the evidence points in the other direction. Further, black police officers are professionals. As such, the presumption

that their line-of-duty performances would not be affected must prevail unless clear evidence shows to the contrary. Accordingly, such generalized and unsubstantiated concerns need not be given any weight.

Thirdly, the government's interest in avoiding the impairment of Departmental operations must be considered. The Department contends that Berger's appearing in "blackface" disrupts its efficiency in two areas: (1) the resources that must be used to preserve the peace when Berger performs severely restricts the ability of the Department to provide services to others; and, (2) the negative effect of Berger's speech on the Department's relationship with the black community greatly hampers efforts to preserve the peace and enforce the law.

The argument that Berger's performances have affected and may continue to affect adversely the Department's resources must be considered both as to the February 9, 1982 incident itself, and as to the future. As the Supreme Court indicated in *Pickering*, the power of the government to regulate its employee's speech stems from the difference between its interest as an employer, and its interest in regulating the speech of the public in general. 391 U.S. at 568. Accordingly, where the interest advanced by the government, as an employer, does not differ from the government's general interests, regulation cannot be justified. Such is the situation in the instant case. The effect of the disturbance created by Berger's performance on the Department's resources is no different from that which would have resulted had a member of the general public starred in the February 9, 1982 show. Dr. Burns, who led the majority of protesters, testified that he did not know that Berger was a police officer until after the February 9 demonstration. Undoubtedly, Bobby Cheeks, leader of the smaller group, would have been at the Hilton, on February 9, regardless of whether Berger's status as a police officer did not generate the response to his act, or the resulting reallocation of Departmental manpower. Thus, the De-

partment's allegations as to the effect of Berger's February 9 performance on the Department's resources is not an element to be factored into the balancing process.

However, in view of the intense interest evinced in Berger's past actions, the Court finds that the effect of his future conduct on the Department's resources will be directly related to his employment as a police officer. The evidence is clear that crowds could well be in attendance at future Berger performances, in order to protest the inappropriateness of a police officer acting in a manner perceived to be demeaning to blacks. At trial, Dr. Burns testified that the NAACP will attempt to inform and mobilize its 10,000-member Baltimore Organization to halt any future "blackface" performances by Berger. Testimony also indicates the possibility of violence. And, while not determinative, the Department's ability to manage any future protests will be adversely affected because a police officer is directly involved. Accordingly, the possible effect of Berger's future performances on the Department resources—in that such effect is reasonably likely to occur must be given some weight. See *Waters v. Chaffin*, 684 F.2d 833, 839 n. 12, 840 (11th Cir. 1982).

The final ground advanced by the Department to show that Berger's exercise of his right to free speech, i.e., his performance in "blackface," substantially impairs its ability to provide services, is that such conduct adversely affects the Department's relationship with the black community—to the point of a substantial disruption. A police department performs a unique governmental function. It is charged with protecting the public and maintaining order in an often chaotic society. Therefore, its interest in regulating speech may often be greater than other public agencies. *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Moreover, when the department is one of a large city such as Baltimore, that interest may be significantly increased.

Childers v. Dallas Police Department, 513 F. Supp. 134, 140-41 (N.D.Tex. 1981).

In addition, the nature of a police department's function involves interests different from those of other governmental agencies. *Muller v. Conlisk*, 429 F.2d 901, 904 (7th Cir. 1970). Protection of the public involves maintaining the cooperation and trust of all segments of that public. Thus, good community relations are essential to the efficient operation of a police department, although they may not be as important to a fire department or a school system. In Baltimore, where the population is 54.8% black, the support of such a large portion of the population is essential. An antagonistic relationship between the Department and the black community both increases the potential for violence, and decreases the efficiency with which services can be provided.

The Department has expended maximum efforts to attain its current relationship with Baltimore's black community. Through the late 60's, this relationship was severely strained. Baltimore's blacks generally viewed their goals, or at least the means to those goals, as being in conflict with the goals of the Department. The strain peaked in the 1968 disturbances. To alleviate the problem, the Department began a concerted effort to change its relationship with the black population in the early 1970's. Aggressive community relations programs were initiated at departmental and district levels, and blockwide and auxiliary programs were directed at the black community. As a direct consequence, communications between the black community and the Department have improved greatly, although they remain somewhat short of the optimal state.

There is clear evidence that Berger's actions have jeopardized this progress. Blacks, particularly members of black interest groups, have reacted negatively to Berger's "blackface" routine. To blacks, Berger's performance is a horrendously offensive stereotype, and a revival of the

contemptible portrayal of blacks epitomized by the minstrel shows of the past. More to the point, the black community associates Berger's actions with the police department. The Department and the Mayor's Office received numerous calls from blacks who were angry at the Department for allowing a police officer to engage in conduct which, in their view, was demeaning to blacks.

Uncontradicted evidence demonstrates the extent of the black community's ire, as well as the potential consequences. At trial, Burns testified that the black community was prepared to go to great lengths to stop Berger's performances. According to Dr. Burns, the Department's relationship with the black population would suffer severely if Berger were allowed to continue his "blackface" shows. And the results would be a loss of hard-won respect and trust. Bobby Cheeks echoed Dr. Burns' sentiments, with a greater emphasis on the potential for violence. The testimony emphasized the potential impact on the Department's efficiency as being both real and great.

However, against these interests must be weighed the interests of Berger in performing Jolson in "blackface," and the interests of the public in having his performance available. Under *Pickering*, determining whether the speech at issue is a matter of public concern precedes the balancing of competing government and employee interests; speech that is not a matter of public concern is not protected in any event. *Connick v. Myers*, 103 S.Ct. 1684, 1689 (1983).

Traditionally, the courts exempt from the public concern category that speech in which the only interest is the private interest of the speaker. For example, in *Connick, supra*, the plaintiff, an assistant district attorney, circulated a questionnaire regarding the performance of the district attorney's office. In discussing whether the questionnaire was a matter of public concern, the Supreme Court distinguished between in formation that is of inter-

est to the public and information that is only of personal interest to the employee. The court found that almost all of the speech at issue dealt with a personal grievance regarding internal office policy, and that the employee was not attempting to inform the public about the agency's operations, but only trying to collect information to fuel an intra-agency controversy with her supervisor. Accordingly, the Court held that the majority of the speech was not a matter of public concern and that the Pickering balancing process need not commence. 103 S.Ct. at 1691. Accord *Cooper v. Johnson*, 590 F2d 559, 562 (4th Cir. 1979) (letter relating to internal administration of sheriff's office and not to pubicly debated matters not of public concern); *Roseman v. Indiana University of Pennsylvania*, 520 F.2d 1364, 1368 (3d. Cir. 1975) *cert. denied*, 424 U.S. 921 (1976) (private communications in which the only interest to more than just the speaker or a select few is of public concern, notwithstanding the relative social importance of the speech. *Egger v. Phillips*, 710 F.2d 292, 316-17 (7th Cir.) *cert. denied* 104 S.Ct. 284 (1983).

The sole prohibition imposed on Berger by the Department's order of February 19, 1982, was to "appearing in public performances wearing 'black-face.'" It did not prohibit him from portraying, or otherwise characterizing Al Jolson in any other manner. Hence, the speech at issue here is Berger's use of "blackface" makeup. Despite the narrow scope of the order, Berger's appearing in "blackface" is a sufficient matter of public concern to clear the first hurdle of Pickering. Even if only entertainment, Berger's appearances were public and drew considerable support and attention. Limiting the issue to appearing in "blackface," the matter is one that transcends Berger's private interest. Accurate portrayal of an historical figure is of significantly more interest to the public than the speech involved in *Connick supra*. That the speech involved here is entertainment does not remove it from the public concern area. "The line between the transmission

of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all." *Stanley v. Georgia*, 394 U.S. 557 (1969). Any ideas derived from the "black face" portrayal, either by Berger or Jolson, are inseparable from its use entertainment.

Despite the fact, however, that Berger's speech is a matter of public concern, the Department's interests outweigh the first amendment interests of Berger and the public. Berger's Jolson performances are essentially personal activities, always presented in off-duty hours, and only tangentially related to the Department and his employment. Compare *Begg v. Moffitt*, 555 F. Supp. 1344 (N.D.Ill. 1983). In that and similar cases, the employee's interest as a citizen weighs in favor of protection. *Egger v. Phillips, supra*, 710 F.2d at 315; *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982); *Hurst v. United States Postal Service*, 491 F. Supp. 870, 873 (W.D.Mo. 1980).

Such personal speech, however, is not absolutely protected. As this Court has stated:

> It cannot be denied that the behavioral pattern of a policeman off duty as well as on is of paramount interest to the Department. His associations are limited by his law enforcement employment. But it can only be limited to such associations or off duty activities that affect his morals and integrity or are inimical to the Department. What he does in his private life, as with other public employees, should not be his employer's concern unless it can be shown to affect in some degree his efficiency in the performance of his duties.

Bruns v. Pomerleau, 319 F. Supp. 58, 67 (D.Md. 1970) (Northrop, C.J.). *Accord Waters v. Chaffin, supra*, 684 F.2d at 838.

Although the essentially personal and off-duty nature of Berger's speech favors protection, several factors shift the

balance. First, the Departmental order restricts Berger only minimally. The order only prohibits Berger from performing in "blackface;" he is free to imitate Jolson's mannerisms, sing Jolson's songs, and, with the exception of "blackface" makeup, wear Jolson's costume.

Second, and most importantly, the speech at issue is not such a matter that Pickering views as particularly important, or worthy of a great deal of protection. In *Pickering*, the Supreme Court felt that certain speech of a government employee should be protected, given the relationship between the employee's position and the content of the speech. The Court stated:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Pickering v. Board of Education, supra, 391 U.S. at 572. Here, this interest of the public to be informed is absent. Berger's Jolson performances are unrelated to his position as a police officer. Thus, although the tangential relationship of the speech to Berger's employment might weigh in favor of protection, the degree of the public's concern in having the speech presented is decreased. *Kannisto v. City of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) cert. denied, 430 U.S. 931 (1977.

Given the narrow scope of the order, and the public's limited interest in having the speech protected, the balance tips in favor of the Department and the Department's interest advances to the level of a compelling state interest. Speech or conduct that discredits the Department and impedes its efficiency by lessening public confidence in the fitness of the Department to conduct the public business with which it is entrusted outweights the limited interest

of Berger and the public. Cf. *Singer v. United States Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977) (discharge of gay rights advocate justified); *Childers v. Dallas Police Department*, 513 F. Supp. 134 (ND.Tex. 1981) (police Department's refusal to hire a gay justified.)

At first glance, allowing the Department to regulate Berger's speech because of the black community's adverse reaction to that speech seems inconsistent with the purpose of the Free Speech clause. A few cases have intimated that to permit the reaction of those offended by the speech to influence the degree of constitutional protection afforded the speech is contrary to the purpose of the free speech guarantee—to insulate speech from the control of those who oppose it. *See Van Ootegnem v. Gray, supra*, 628 F.2d at 493; *Briggs v. North Muskegon Police Department*, 563 F. Supp. 585, 590 (W.D. Mich. 1983). Closer scrutiny, however, reveals that the apparent conflict is merely illusory. In regulating, the government is acting in its capacity as employer. As a employer, its interest expand. A private employer has wide latitude in regulating the conduct of his employees when that conduct interferes with the efficient operation of his business. Next, and closely related, the impact on the ability of the government to perform services, not the adverse reaction of those opposing the speech, justifies regulation. The reaction of those opposing the speech, justified regulation. The action to the speech must in some compelling way impair the ability of the agency in question to perform its function. Lastly, all factors being equal, *Pickering* compels the same result without regard to the content of the speech; the effect on the government is the only criteria. See *Battle v. Mullholland*, 439 F.3d 321 (5th Cir. 1971). The limitation in content applies only to the public employee. Thus, no conflict with the purpose of the Free Speech clause exists that would prohibit the Department from regulating Berger's

speech. *Childers va. Dallas Police Department*, 513 F. Supp. 134, 141-42 (N.D. Tex. 1981).

Berger also claims that the Department refused him permission to perform in his off-duty hours for compensation, while allowing others similarly situated to do so. He contends that this Departmental action is in retaliation for his previous "blackface" performances, and an effort to restrain similar performances in the future, which he claims are constitutionally protected. This particular claim, although addressed in the initial pleadings and pretrial order, was not pursued at trial, in post-trial memoranda; or in final argument. There was no mention of this claim in Berger's post-trial memorandum, and defendants' memorandum regarded the Pickering issue as the only issue remaining in the case. While the status of this claim is unclear, it will, nevertheless, be addressed by the Court.

The Department advances a variety of reasons for denying Berger permission to perform for compensation: (1) Berger's continuing performances in "blackface" in contravention of an order not to do so during the investigation by the Department's Internal Affairs Division; (2) his excessive use of medical leave; and, (3) his history of performing at establishments that served alcohol, which conduct violated Departmental regulations. The Court finds, however, that the Department withheld permission in an attempt to stop future performances that might anger the black community. As already discussed, the Department's interest was such that it could validly regulate Berger's conduct. The only issue is whether the Department could deny Berger permission to perform for compensation to enforce that interest.

Similar orders in other situations might be overbroad because the actions at issue affect conduct other than that in which the government has regulatory interest. However, on the facts of this case, the Department's denial of permission to perform for compensation was justified. After

the Hilton Hotel incident on February 9, 1982, Captain Jasper issued the order prohibiting Berger from appearing in "blackface." On February 23, Berger sought permission for secondary employment. Captain Jasper denied Berger's application on March 2, even though Berger's more immediate superiors had approved it. Deputy Commissioner Robinson later affirmed Jasper's decision. One reason given for Captain Jasper's denial was that Berger had continued to perform, although ordered to cease during the Departmental investigation. Given the Department's legitimate interest in regulating Berger's use of "blackface" makeup, and given Berger's refusal to obey the Department's order to cease performing while his case was under investigation, the Department could further act to regulate Berger's speech by means broader than those originally justified. Under these circumstances, the Departmental denial of permission for secondary employment was proper.

CONCLUSION

For the reasons set forth, the Court upholds the Police Department's actions in this case, despite the first and fourteenth amendment interests asserted by the plaintiffs herein. Accordingly, the plaintiffs are not entitled to and are denied all requested relief, and judgment will be entered in favor of the defendants, against the plaintiffs.

WALTER E. BLACK, JR.
United States District Judge

Dated: March 21, 1984.

Supreme Court, U.S.
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No. 85-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK J. BATTAGLIA, *et al.*,
Petitioners,

v.

ROBERT M. BERGER, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a white police officer who, in his off-duty hours, performs in public, in blackface makeup, an imitation of the late singer Al Jolson, consistently with the First and Fourteenth Amendments, be disciplined by the Police Department for conduct "that tends to reflect discredit upon himself or upon the Department," on the ground that certain black citizens objected to the performance, and the Department feared that the officer's activity would impair its community relations efforts with black citizens.

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

FRANK J. BATTAGLIA, Individually and as Police Commissioner, City of Baltimore,

and

Baltimore Police Department

Appellees Below
Petitioners Here

v.

ROBERT M. BERGER

and

RAY FRANKLIN BARHIGHT, JR.

Appellants Below
Respondents Here.

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IN THE

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FRANK J. BATTAGLIA, *et al.*,

Petitioners,

v.

ROBERT M. BERGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondents, Robert M. Berger and Ray Franklin Barhright, Jr., respectfully pray that the Petition for Writ of Certiorari, as sought by the Baltimore Police Department, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 779 F.2d 992 (4th Cir. 1985), reprinted in the Petition for a Writ of Certiorari as Appendix A. The opinion of the United States District Court for the District of Maryland is unreported (No. B-82-880,

USDC, DMD., March 21, 1984), reprinted in the Petition for a Writ of Certiorari as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 20, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV:

> § 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, § 1983.

Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Ter-

ritory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be construed to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Respondents accept Petitioners' statement of the case with the following exceptions more accurately set out by the Court of Appeals:

> In none of his performances did Berger identify himself as a police officer; offer any comment on Department policies or operations; make any reference to any other member of the Department; nor claim to be speaking for or in any way representing the Department. Although various media, in commenting on or describing his performance, referred to him as "the singing cop," that designation was, so far as the record reveals, theirs, not Berger's.
>
> In his performance Berger's only purpose was to provide entertainment for willing listeners. He urged no conduct, incited no activity, made no derogatory or inflammatory remarks, advocated no lawlessness and sought no confrontation.
>
> From at least 1979 Berger's superiors within the Police Department were aware of his musical activities, including the Al Jolson impersonation. On several occasions Deputy Commissioner William F. Rochford had introduced him to visitors as "the Department's Al Jolson." A member of the command staff (defined as officers of the rank of captain and

above)—one Colonel Avara—made a practice of asking him to sing "Mammy" when he encountered him on the street, in full uniform. Numerous members of the command staff, including the deputy commissioner, had seen him perform in clubs and taverns. Prior to 1982, no member of the Department had complained to him about the content of his act or suggested that he not perform it in blackface.

Although he never heard anyone directly threaten anyone else, Sgt. Lawson feared possible violence if these rumors materialized into fact. He therefore requested additional police assistance.

Berger v. *Battaglia*, 779 F.2d 992, 993-95, Petition for Writ of Certiorari, hereafter Petition, 2A-6A.

REASONS FOR DENYING THE WRIT

1. THE ISSUE OF WHETHER A POLICE DEPARTMENT MAY CONDITION THE CONTINUED EMPLOYMENT OF ONE OF ITS OFFICERS UPON HIS CESSATION OF OFF-DUTY PUBLIC PERFORMANCES IN BLACKFACE DOES NOT POSE UNSETTLED QUESTIONS OF FEDERAL LAW.

When a public employer seeks to regulate or restrict its employee's speech, this Court has held that a balancing of competing interests must take place. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The interests to be reconciled are those of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Three years ago this Court applied the *Pickering* test to the discharge of a former assistant district attorney for her speech regarding an interoffice dispute. *Connick* v. *Myers*, 461 U.S. 138 (1983). In that case the employee was found not to have met the threshold requirement that the speech deal with "matter of public concern." *Id.* at 146-47.

In holding that black police officers could not be dismissed for picketing their department and removing the United States flag from their uniforms in protest of the department's racially discriminatory practices, the Court of Appeals for the Eleventh Circuit outlined the procedure to be followed when a public employee challenges a personnel action on grounds of freedom of speech. *Leonard* v. *City of Columbus*, 705 F.2d 1299 (11th Cir. 1983). The plaintiff has the initial burden of proving that his speech or conduct was a substantial motivating factor in the personnel decision and that the speech or conduct was constitutionally protected. *Id.* at 1303, following the rule established in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). This burden is met by the plaintiff's establishing that his speech is protected under the *Pickering* balancing test, the threshold of which is that the speech deal with a matter of public concern. *Connick*, 461 U.S. at 146. Once the plaintiff has met this burden, the burden of proof shifts to the public employer to show that it would have reached the same decision in the absence of the protected speech. *Leonard*, 705 F.2d 1304; *Berdin* v. *Duggan*, 701 F.2d 909, 911-12 (11th Cir. 1983).

In the present case, the Court of Appeals for the Fourth Circuit followed the procedure outlined above, which resulted in its holding for Officer Berger. At each step, the Respondent was found to have met his burden, while the Petitioner was unable to demonstrate its right to discipline him.

A. The Question Whether Or Not Respondent's Performance Was "Speech Upon A Matter Of Public Concern" Was Not Raised In The Court Of Appeals.

While the Petitioner did express some concern with the District Court's characterizing Officer Berger's expres-

sions as "a matter of public concern," (Appellee's Brief for Court of Appeals, at 7-9), the Police Department did not dispute that Officer Berger's performance amounted to "speech" and was entitled to some constitutional protection. The Court of Appeals, in fact, remarked on the absence of disagreement on this point:

> . . . the district court held that the speech, as a form of artistic expression presented to obviously interested public audiences, was, for the purpose at hand, "on a matter of public concern." *The defendants do not on appeal challenge that basic determination*, and we agree with it.

Berger v. *Battaglia*, 779 F.2d at 998, emphasis added; Petitoner, 12a-13a.

Despite this Court's power to conduct an independent review of the record in constitutional cases, questions not raised or considered below are usually not examined on review by *certiorari* unless thate is plain error. *New York Dock Co.* v. *S.S. Poznan*, 274 U.S. 117, 123 (1927). In this case, Petitioner, by raising issues which it did not challenge in the courts below, seeks to inject a new theory at a very late stage.

Both the District Court and the Court of Appeals correctly resolved all questions concerning the nature of Officer Berger's expression. Before holding that Officer Berger's speech was within the *Pickering* spectrum, and "of a matter of public concern," the Court of Appeals necessarily found that the performance was in fact "speech." 779 F.2d at 996, 998-999; Petitioner, pp. 8a-9a, 12a-15a.[1]

---

[1] Although the Petitioners, Petition, pp. 10-13, argue that Berger's wearing blackface could be characterized as "symbolic" expression, perhaps meriting lesser first amendment protection, the district

B. The Respondent's "Speech" Was On A Matter Of Public Concern.

This Court in *Connick* v. *Meyers*, defined "matters of public concern" as expression "fairly considered as relating to any matter of political, social, or other concern to the community." 461 U.S. at 146. Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-148.

Applying the *Connick* test, the Court of Appeals agreed with the district court "that the speech, as a form of artistic expression, presented to obviously interested public audiences, was, *for the purpose at hand*, 'on a matter of public concern.'" 779 F.2d at 998; Petition, 12a, emphasis added. Thus, the fact that the content was entertainment did not make the performances any less a "matter of public concern," nor take them outside first amendment protection. *E.g.*, *Stanley* v. *Georgia*, 394

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court recognized that the blackface makeup is an unseverable part of the total performance, which strives for maximum verisimilitude and without which the attempted reincarnation of Al Jolson would lose its point. The district court stated, "[A]ccurate portrayal of an historical figure is of significantly more interest to the public than the speech involved in *Connick*, *supra*." *Berger* v. *Battaglia*, Mem. Opinion No. B-82-880 (D. Md. March 21, 1984), Petition, p. 38a. As to the nature of the expression itself, this Court has declared, "[T]he line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all." *Stanley* v. *Georgia*, 394 U.S. 557 (1969). This Court has also recognized that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence* v. *Washington*, 418 U.S. 405, 411 (1974). In the context in which Berger wore blackface for his Al Jolson performances, the makeup was given meaning by character he portrayed.

U.S. 557, 566 (1966). The additional fact that the content of Berger's performances did not concern the af fairs of his employer, if of any avail, would place him outside the *Pickering* scheme and into the shoes of an ordinary citizen. *See Connick*, 461 U.S. at 157, Brennan, J., *Dissenting Opinion.*

C. An Off-Duty, Out Of Uniform Police Officer Whose Speech Did Not Concern His Employer, Has The Same Right Of Free Speech As Any Member Of The General Public.

Recognizing the governmental interest in promoting the efficiency of the public service, *Pickering* accords the government as employer rights to regulate speech that it lacks as sovereign. 391 U.S. at 568, *Wilson* v. *City of Littleton, Colo.*, 732 F.2d 765, 767 (10th Cir. 1984). It follows, however, that when the employee, speaks on a subject that is not work related, the government employer loses the enhanced rights of the employment context because the efficiency of its public service is not compromised.

> The balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the government's interests as an employer. When public employees engage in expression unrelated to their employment while away from the work place, their First Amendment rights are, of course, no different from those of the general public. See [391 U.S.] at 574, 88 S.Ct. at 1737. Thus, whether a public employee's speech addresses a matter of public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently.

Connick v. *Myers*, 461 U.S. at 157, Brennan, J., *dissenting opinion.*

Connick recognized that the time, place and manner of the speech in question is relevant in the *Pickering* analysis. 461 U.S. at 152. In *Connick*, this Court paid special attention to not only the fact that the employee's critical questionnaire was prepared and distributed at her office, but also that "the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed." *Id.* at 153. It was this fact that distinguished *Connick* from *Pickering*, as the evidence substantiated the supervisor's fear that the efficient functioning of the office was jeopardized. *Id.*

In a case involving a police officer, the Court of Appeals for the Eleventh Circuit held that the officer could not be disciplined by his superiors for remarks made to a friend in a bar when the officer was off-duty and out of uniform. *Waters* v. *Chaffin*, 684 F.2d 833 (11th Cir. 1983). The court noted, "[I]n addition to Waters' fundamental interest in speaking as he chooses, he has an interest in being free from unnecessary work-related restrictions while off-duty." *Id.* at 837.

Officer Berger's performances, as the Court of Appeals recognized, merit the same constitutional protection as the speech of any other citizen, since his performances were not at the Police Department, and the content did not concern the Department. Subject only to a few exceptions not relevant here, speech is protected regardless of the social, political or ideological value of its content. The guarantee of the First Amendment extends to the trivial as well as the ponderous, the vulgar as well as the lyrical. *Stanley* v. *Georgia*, 394 U.S. 554, 89 S.Ct. 1243; *Winters* v. *New York*, 333 U.S. 507, 68 S.Ct. 665 (1948). The First Amendment extends to trash if it stops short of obscenity, *Huffman* v. *United States*, 470 F.2d 386 (D.C. Cir. 1971), and, if no immediate breach of the peace is threatened,

protects the vulgar and the profane as well as "wholly neutral futilities," *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. den.*, 393 U.S. 1016, *See also Connick* v. *Myers*, 461 U.S. at 138, n. 1, Brennan, J., *dissenting opinion*. Thus Officer Berger's performances are no less shielded from regulation by his employer for being light-minded.

The protection of the First Amendment, extends to those who wish to attend and hear Berger's performances as well. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Those who might take offense at the content of Berger's speech are not empowered to suppress speech because of its perceived message, nor may the government regulate speech, even of its employees, to protect their sensibilities. *E.g.*, *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). One of the "high purposes" of the First Amendment is to provide a hospitable climate for expression that "invite[s] dispute . . . induces a condition of unrest, created dissatisfaction with conditions as they are, oreven stirs people to anger." *Id.* at 4. *See also, e.g.*, *Coates* v. *City of Cincinnati*, 401 U.S. 611, 615 (1971); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Street* v. *New York*, 394 U.S. 576, 592 (1969); *Edwards* v. *South Carolina*, 372 U.S. 229, 237 (1963); *Collin* v. *Smith*, 578 F.2d 1197 (7th Cir. 1978).

Thus, although Berger was a public employee, his performances were such that the *Pickering* analysis is not necessary inasmuch as the speech occurred off duty and did not concern his employer.

II. THE LOWER COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *PICKERING* TEST TO CASES WHICH REQUIRE BALANCING THE INTERESTS OF THE PUBLIC EMPLOYEE, AS A CITIZEN, IN COMMENTING ON MATTERS OF PUBLIC CONCERN AND THE INTEREST OF THE STATE, AS AN EMPLOYER, IN PROMOTING THE EFFICIENCY OF THE PUBLIC SERVICES IT PERFORMS THROUGH ITS EMPLOYEES.

The lower courts' use of the *Pickering* analysis exhibits not a state of confusion, as Petitioners assert, but attention to this Court's admonition in *Connick*, that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48. This statement compels a careful, case-by-case application of the *Pickering* test. In striking a proper balance, courts must weigh the factual record in each case, rather than attempting to fit a myriad of disparate situation into a systematic mold. This is also true for *Pickering*'s subsequent balancing of the government's interest and that of its employees. Thus, those cases that Petitioner contends demonstrate confusion and inconsistent application of the *Pickering* analysis, actually , on close scrutiny, display a careful application to distinguishable facts.

The Court of Appeals for the Eleventh Circuit recently upheld a sheriff's department's dismissal of a clerk who had identified himself on television as both a Ku Klux Klan recruiter and a sheriff's office employee. *McMullen* v. *Carson*, 754 F.2d 936 (11th Cir. 1985). In applying the *Pickering* analysis, the court paid particular attention to the employee's participation and "to the nature, both actual and perceived, of the Klan as a *violent*, *criminal*, and *racist* organization." *Id.* at 938 (emphasis added). The

court found under the balancing test that the sheriff's office need not permit a known Klan member who embraced the organization's unlawful purpose to stay on in any position contrary to its charge of "securing the safety of persons and property, and enforcing the law." *Id.* at 939. By the same token, a police department is not required to hire a known homosexual who has admitted to habitual conduct in violation of the state's statute prohibiting deviate sexual acts. *Childers* v. *Dallas Police Department*, 513 F.Supp. 134 (N.D. Texas 1981). While the results of the *Pickering* analysis in these cases were opposite that of the present case, the test was properly applied to situations in which the actual conduct of the employee was illegal or directly contrary to the responsibilities of the employer, rather than based on perceptions of that conduct by others.

Even when the speech of the employee does not conflict with the responsibilities of the public employer, it may still be regulated if it is not a matter of public concern. *See Connick* v. *Myers*, 461 U.S. 138. The Court of Appeals for the Tenth Circuit held that a police officer was properly dismissed for disobeying an order to remove a black shroud from his badge while on duty. *Wilson* v. *City of Littleton, Colo.*, 732 f.2d 765 (10th Cir. 1984). The court ruled that although the shroud was worn to mourn the death of a fellow officer, "the content, form and context of the given statement as revealed by the whole record" showed that the speech was *not* "upon a matter of public concern." *Id.* at 768-69. Had that speech found to be of public concern, as in *Leonard* v. *City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), the *Pickering* balance would have swung for the employee.

The Court of Appeals for the Fourth Circuit has likewise reached differing results while correctly applying

the *Pickering* test to particular cases. As Petitioner has pointed out, Petition, p. 22-23, that court has recognized that because of its additional interest as an employer, the government "*may* have interests in regulating the speech of its employees that differ from its interests in regulation of the citizenry at large." *Hickory Fire Fighters Ass'n* v. *Cit of Hickory, N.C.*, 656 F.2d 917 (4th Cir. 1981); *Henrico Professional Firefighters Ass'n, Local 1568* v. *Board of Supervisors*, 649 F.2d 237, 243 (4th Cir. 1981). Petitioner would have this Court ignore the discretionary element of the word "may." The *Pickering* balance, as Petitioner conceives it, must always be struck in favor of the employer. However, in *Hickory*, as in *Berger*, the court followed its role as defined by this Court and upheld the employee's right to speak on matters of public concern.

In the present case, the Court of Appeals for the Fourth Circuit correctly applied the *Pickering* analysis when it held that the Baltimore Police Department could not condition the continued employment of one of its police officers on his cessation of off-duty public entertainment in blackface, the content of which regarded a matter of public concern but did not discuss the internal operations or relationships of the Department. Taking into account the fact that Berger did not identify himself as a police officer, the court also correctly held that the Department's fear of external disruptions resulting from his performances did not overcome the officer's right of free speech.

In summary, although the results of individual cases may vary, these contrary results are reflective of the particular facts of each case. The *Pickering* test has been correctly and uniformly applied as law throughout the lower courts.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that a Writ of Certiorari should not issue in this case.

Respectfully submitted,

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